

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

SETH PAUL LEMKE,)	
)	
Plaintiff,)	
vs.)	NO. CIV-08-0006-HE
)	
DENNIS BANTHER, ET AL.,)	
)	
Defendants.)	

ORDER

Plaintiff Seth Paul Lemke, a state prisoner appearing *pro se*, filed this action pursuant to 42 U.S.C. § 1983 alleging violations of his constitutional rights while he was confined in the Kingfisher County Jail. The plaintiff sued Dennis Banther, the Sheriff of Kingfisher County, and Yvonne Dow, the District Court Clerk for Kingfisher County. Consistent with 28 U.S.C. § 636(b)(1)(B), the matter was referred to Magistrate Judge Doyle W. Argo. He recommends that a motion to dismiss filed by defendant Dow be denied and a motion to dismiss filed by defendant Banther be granted unless the defendant files an amended complaint within twenty days of any order adopting the Report and Recommendation.

Defendant Dow has objected to the Report and Recommendation. The court, having conducted a de novo review, agrees with the magistrate judge's analysis of the plaintiff's claims.¹ The complaint, as pleaded, fails to state a claim against Sheriff Banther and


¹*The plaintiff's response, although entitled an Objection to the Report and Recommendation and docketed as such, was, in fact, a request for an extension of time to respond to the Report and Recommendation. Due to the court's disposition of the pending motions, the plaintiff's request for an extension is denied. As the plaintiff is being granted leave to amend his clearly deficient allegations against defendant Banther and defendant Dow's motion is being denied, the plaintiff will not be prejudiced if he is denied leave to respond to the Report and Recommendation.*

defendant Dow has not demonstrated, on the basis of the complaint alone, that she is entitled to judicial immunity from suit.² The court declines to consider her qualified immunity argument as it was not presented to the magistrate judge for his consideration.

Accordingly, the court adopts the Report and Recommendation of Magistrate Judge Argo. Defendant Banther's motion to dismiss [Doc. #19] is **GRANTED**, unless the plaintiff files an amended complaint amending his claim against defendant Banther by February 2, 2009. Defendant Dow's motion to dismiss [Doc. #18] **DENIED**. The matter is referred back to Magistrate Judge Argo for further proceedings.

IT IS SO ORDERED.

Dated this 13th day of January, 2009.



JOE HEATON
UNITED STATES DISTRICT JUDGE

²The defendant relies on documents attached to her motion, asserting that they can be considered by the court as they are central to the plaintiff's claim and referenced in his Amended Complaint. However, it is unclear whether she has attached all pertinent documents. See defendant Dow's motion to dismiss, p. 2 [Doc. # 18] ("(See, for example"). The court cannot take judicial notice of the filings in the plaintiff's case because Kingfisher County does not have an electronic case filing system accessible to the public.